



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1382

THE OMAHA NATIONAL BANK,

Petitioner,

vs.

NEBRASKANS FOR INDEPENDENT
BANKING, INC., et al.,

Respondents.

PETITIONER'S MEMORANDUM ANSWER
TO SUPPLEMENTAL MEMORANDUM OF RESPONDENTS

Virgil J. Haggart, Jr.
Craig W. Thompson

Baird, Holm, McEachen,
Pedersen, Hamann & Haggart
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

Attorneys for Petitioner

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION-----	1
ARGUMENT-----	1
I. The Case is Not Moot-----	1
II. It Would be Inappropriate to Dispose of the Petition on Grounds of Mootness-----	4
III. If the Court disposes of this Case on Grounds of Mootness, it Should Grant Certiorari, Reverse or Vacate the Judgment of the Court of Appeals, and Remand the Case to the Trial Court with Instructions to Dismiss-----	6
CONCLUSION-----	7

STATUTE CITED

LB 763, Nebraska Legislature, 1976 Session--1, 2, 3, 4, 5,
6, 7, 8

CASES CITED

President & Commissioners of Princess Anne,
393 U.S. 175 (1968)----- 2

Southern Pacific Terminal Co. v. I.C.C.,
219 U.S. 498 (1911)-----2,3

	<u>Page</u>
<u>Bus Employees v. Missouri</u> , 374 U.S. 74 (1963)	2
<u>Commonwealth of Virginia v. Farmers & Merchants National Bank</u> , 480 F.Supp. 568 (W.D. Va. 1974); aff'd per curiam 515 F.2d 154 (4th Cir. 1975); cert. denied, 44 U.S.L.W. 3205 (U.S. Oct. 6, 1975)	4
<u>United States v. Munsingwear, Inc.</u> , 340 U.S. 36 (1950)	6

INTRODUCTION

This Memorandum is submitted in answer to the Supplemental Memorandum of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit (hereafter called "Supplemental Memorandum"). Petitioner is informed that Respondents' Supplemental Memorandum was filed in response to a request by the Court, on May 21, 1976, that Respondents file with the Court a statement of their position with regard to the effect of the passage by the Nebraska Legislature of LB 763, subsequent to the decision of the Court of Appeals in this case.

Believing that the Court cannot and need not address the merits of the issue of the constitutionality or validity of LB 763, and surmising that the Court is concerned about the possibility of mootness by virtue of the passage of LB 763, counsel for Petitioner will not discuss the validity of LB 763, but will limit the scope of this Memorandum solely to the issue of mootness.

ARGUMENT

I. THE CASE IS NOT MOOT

Although for different reasons, the parties agree that this case is not moot by virtue of the passage of LB 763. As set

forth at length in its Petition, Petitioner contends that the passage of LB 763 is irrelevant, because state law, whether it be LB 763 or its predecessor statute in effect at the time of the decision of the Court of Appeals, has no bearing on the central issue in this case, i.e., whether Petitioner's facility at 18th and Douglas Streets in Omaha is a branch bank. This court's decision in the Dickinson case requires that that issue be decided under federal law, and not state law.

Respondents contend in their Supplemental Memorandum that LB 763 does not render the case moot because the statute is unconstitutional or otherwise invalid. While Petitioner certainly does not concede this argument, the validity of LB 763 is immaterial, because the statute itself is wholly irrelevant to the central issue in this case.

Petitioner acknowledges that agreement between the parties that the case is not moot does not preclude the Court from finding that it is. In view of the previous decisions of the Court, however, it is respectfully submitted that the case at bar should not be found moot.

In President & Commissioners of Princess Anne, 393 U.S. 175 (1968), the Court held that although the contested ten-day injunction restraining petitioners from holding rallies or meetings had long since expired, the case was not moot. Citing Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498 (1911), and Bus Employees v. Missouri, 374 U.S. 74 (1963), the Court stated:

" . . . The underlying question persists. . . : whether, by what process, and to what extent the authorities of local government may restrict petitioners in their rallies and public meetings." 379 U.S. 179.

By a parity of reasoning, it may be correctly stated, of the effect of LB 763 upon the instant case, that the underlying question persists: whether state law may play a dominant role in the determination of whether a facility of a national bank is or is not a branch.

As in Southern Pacific Terminal Co. v. I.C.C., supra, the question in this case is a continuing and recurring one, affecting the regulation of branching activities of national banks in every state which imposes limitations of any kind on branch banking.

Further, it cannot be said that the passage of LB 763 resolves the controversy even between the parties themselves in this case. While the statute, if applicable, might remove Respondents' objection to the location of Petitioner's facility in relation to its main bank, it does nothing to eliminate the controversy between the parties as to the nature and extent of the banking activities which may be carried out at the facility. Throughout this litigation, Petitioner has contended that the facility is an integral part of the main bank, and that all banking activities permissible at its Woodmen Tower location are likewise permissible at the 18th and Douglas location. But LB 763 would impose stringent limitations upon the activities permitted at the

18th and Douglas location, restricting Petitioner to receiving deposits, cashing checks, and receiving payments payable at the main bank. Supplemental Memorandum, App. D, p. 3.

Finally, it should be pointed out for the information of the Court, but certainly not as an argument ultimately dispositive of the question, that even if the effect of LB 763 is to render this case moot, that result could not obtain at this time, simply because the statute is not yet in effect. As pointed out in the Petition (fn. 16, pp. 13, 14), the statute will not become effective until ninety days after adjournment of the legislative session at which it was enacted. The Legislature adjourned on April 9, 1976; LB 763 will not become effective until July 10, 1976.

II. IT WOULD BE INAPPROPRIATE TO DISPOSE OF THE PETITION ON GROUNDS OF MOOTNESS

It is respectfully submitted that the interests of justice would not best be served by disposing of the Petition on grounds of mootness, for at least two reasons. First, such a disposition would not cleanly resolve the conflict between the decision of the Court of Appeals for the Fourth Circuit in Commonwealth of Virginia v. Farmers & Merchants National Bank, 480 F.Supp. 568 (W.D. Va. 1974); aff'd per curiam 515 F.2d 154 (4th Cir. 1975); cert. denied, 44 U.S.L.W. 3205 (U.S. Oct. 6, 1975), and that of the Court of Appeals for the Eighth Circuit in the case at bar. Even if the Court's disposition of this case were to grant certiorari and summarily to reverse or vacate the judgment of the Court of

Appeals on grounds of mootness, doubt would remain as to the precedential value of the Fourth Circuit's decision in the Farmers & Merchants case. The case at bar affords the Court the opportunity to resolve that conflict decisively and clearly, and to apprise the national banking industry, and the federal courts and agency which regulate it, whether or not they may continue to rely on the rules enunciated by this Court in the Dickinson and Walker Bank cases. The public interest and the ends of justice will be best served if the Court avails itself of that opportunity.

Second, a disposition of this case on grounds of mootness will deprive Petitioner of a clear definition of its legal position, to which it should be entitled at the conclusion of this protracted litigation. Such a disposition would necessarily presuppose the validity of LB 763, but probably would not adjudicate it, because there is no evidence in the record upon which to base such an adjudication. Consequently, Petitioner, after nearly three years of administrative, quasi-judicial and judicial proceedings, would find itself, on the one hand, without a decision on the merits on the issue litigated, and on the other hand, subject to further attack by Respondents or others similarly situated, based upon the alleged invalidity of LB 763. Such an outcome is manifestly unfair to Petitioner, and should be avoided in the interests of substantial justice. That Respondents are prepared and intend to mount such an attack should be evident from their strategy before this Court: although it is obviously a potentially potent argument for denial of review, Respondents made no suggestion of the

possibility of mootness in their Brief in Opposition, and when asked by the Court to comment on it, denied the possibility in their Supplemental Memorandum, thus seeking to preserve their opportunity to challenge LB 763 in subsequent, separate litigation.

III. IF THE COURT DISPOSES OF THIS CASE ON GROUNDS OF MOOTNESS, IT SHOULD GRANT CERTIORARI, REVERSE OR VACATE THE JUDGMENT OF THE COURT OF APPEALS, AND REMAND THE CASE TO THE TRIAL COURT WITH INSTRUCTIONS TO DISMISS.

As stated in United States v. Munsingwear, Inc., 340 U.S. 36 (1950), the established practice of this Court, in dealing with a civil case from a court in the federal system which has become moot, is to reverse or vacate the judgment below and to remand the case with a direction to dismiss it. Indeed, this has become the Court's "standard position" in such cases, subject to "but few exceptions" in recent years. Ibid., fn. 2, 340 U.S. 40.

While such a disposition of this case would be, in Petitioner's view, incomplete and indecisive, it would, at least, relieve Petitioner of the onus of the erroneous decision of the Court of Appeals. In the words of this Court:

" . . . That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented by happenstance. When that procedure is followed, the rights of all parties are preserved. . . ." United States v. Munsingwear, Inc., supra, 340 U.S. 40.

It is respectfully submitted that, in any event, it would be inequitable for the Court to dispose of this case on grounds of mootness, prior to the time LB 763 becomes effective on July 10, 1976. Such a disposition, prior to July 10, might oblige Petitioner to close the 18th and Douglas facility for the short period of time between the Court's decision and the effective date of LB 763, only to reopen the facility on July 10. The consequent disruption of customer convenience, customer relations, and Petitioner's operations, would be needlessly harsh and oppressive.

CONCLUSION

Although reaching their conclusions for different reasons, the parties agree that this case is not moot, and that the Court should not dispose of it on those grounds. Further, there is ample precedent in the Court's previous decisions to support a determination that the case at bar is not moot.

The central issue in this case is clearly defined, and presents the Court with an opportunity to make an adjudication which will squarely determine whether its holdings in the Dickinson and Walker Bank cases will continue to stand as authoritative guidelines for the banking industry, and the federal courts and federal agency charged with the regulation of branching activities of national banks. Such an adjudication will also cleanly resolve the otherwise irreconcilable conflict between the Fourth and Eighth

Circuits on the central issue presented in this case, and will determine whether state legislatures and administrative agencies are to have a more dominant role in the regulation of national banks than they have been accorded in the past.

For the reasons stated in its Petition, The Omaha National Bank respectfully urges the Court that the only appropriate disposition of this case is to grant certiorari and to reverse the decision of the Court of Appeals on the merits. Petitioner believes that the judgment of the Court of Appeals is so patently in conflict with this Court's holding in the Dickinson case that reversal on the merits could properly be adjudicated in a summary manner, without the submission of further briefs and the hearing of oral argument.

To dispose of the case on grounds of mootness would be to deprive Petitioner of the clear determination of its legal position, to which it should be entitled at the conclusion of this protracted litigation; to leave Petitioner in an ambiguous position in the probable event of future litigation challenging the validity of LB 703; to leave undisputed the cloud of doubt with which the Court of Appeals has surrounded this Court's decisions in the Dickinson and Walker Bank cases; and to leave wholly unresolved the squarely conflicting rationales of the Court of Appeals in this case and the Court of Appeals for the Fourth Circuit in the Farmers & Merchants case.

If, however, the Court decides to dispose of this case on grounds of mootness, it is clear from its prior decisions that the proper method of disposition is to grant certiorari, to summarily reverse or vacate the judgment of the Court of Appeals, and to direct the trial court to dismiss the case.

Respectfully submitted,

ORIGINAL SIGNED BY
VIRGIL J. HAGGART, JR

Virgil J. Haggart, Jr.
Craig W. Thompson

BAIRD, HOLM, McEACHEN,
PEDERSEN, HAMANN & HAGGART
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

Counsel for Petitioner